

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amended §7.102.

The commission adopts amended §7.102 *without change* to the proposed text as published in the June 10, 2016, issue of the *Texas Register* (41 TexReg 4157), and therefore will not be republished.

Background and Summary of the Factual Basis for the Adopted Rule

The Memorandum of Understanding (MOU) between the Texas State Soil and Water Conservation Board (TSSWCB) and TCEQ became effective on June 9, 1997. A Letter of Agreement (LOA) regarding inspections of dry poultry litter operations and complaint protocol for water quality complaints on animal feeding operations (AFOs) with a certified water quality management plan (WQMP) and dry poultry litter operations became effective on August 24, 2007. Changes to the MOU are necessary to reflect the TCEQ's current statutory name and the TSSWCB and TCEQ's current procedures for coordinating the jurisdictional authority, program responsibilities, procedural mechanisms for point and nonpoint source pollution programs, and to incorporate applicable conditions of the LOA into the MOU. To update the MOU, the TSSWCB initiated rulemaking for 31 TAC §523.5 (Memorandum of Understanding between the Texas State Soil and Water Conservation Board and the Texas Commission on Environmental Quality) on November 19, 2015, and published for comment the proposal in the December 18, 2015, issue of the *Texas Register* (40 TexReg 9099). During the TSSWCB comment period no comments were received. On January 21, 2016, the TSSWCB adopted the amendment

to 31 TAC §523.5, specifically adopting the MOU and making the rule effective (February 19, 2016, issue of the *Texas Register* (41 TexReg 1253)). This rulemaking adopts the amendment of the current MOU in §7.102 and replaces it with an adoption by reference of the full text of the revised MOU at 31 TAC §523.5.

Section by Section Discussion

The adopted amendment to §7.102 changes the agency's name from the "Texas Natural Resource Conservation Commission" to the "Texas Commission on Environmental Quality" and adopts by reference the MOU adopted by the TSSWCB in 31 TAC §523.5.

Final Regulatory Impact Determination

The commission reviewed the adopted rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rule is not subject to Texas Government Code, §2001.0225 because it does not meet the criteria for a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the adopted rule is to update the MOU between the TSSWCB and the TCEQ to reflect the TCEQ's current statutory name and the TSSWCB and TCEQ's current procedures for coordinating the jurisdictional authority, program responsibilities, and procedural mechanisms for point and nonpoint source pollution programs. The original MOU

between the agencies became effective June 9, 1997. An LOA regarding inspections of dry poultry litter operations and complaint protocol for water quality complaints on AFOs with a certified WQMP and dry poultry litter operations became effective on August 24, 2007. Changes to the MOU are also necessary to incorporate applicable conditions of the LOA into the MOU. The adopted amendment would replace the LOA.

The adopted rule does not meet the definition of a major environmental rule because the adopted rule only explains existing agency responsibilities rather than creates substantive requirements to protect the environment. The intent of the rule is merely to clarify and explain jurisdiction of the respective agencies. Because the intent of the rule does not create or require actions for the purpose of protecting the environment or reducing risks to human health from environmental exposure, the adopted rule is not an environmental rule. Additionally, the adopted rule does not meet the definition of a major environmental rule because it is not anticipated that the adopted rule will adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the adopted rule merely explicates jurisdiction of the respective agencies and does not impose new requirements. Finally, the adopted rule action does not meet any of the four applicability requirements for a major environmental rule listed in Texas Government Code, §2001.0225(a). Therefore, the commission concludes that the adopted rule does not meet the definition of a major environmental rule.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received on the Regulatory Impact Analysis Determination.

Takings Impact Assessment

The commission evaluated the adopted rulemaking and performed an assessment of whether the adopted rule constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rulemaking is to update the MOU between the TSSWCB and the TCEQ to reflect the TCEQ's current statutory name and the TSSWCB and TCEQ's current procedures for coordinating the jurisdictional authority, program responsibilities, and procedural mechanisms for point and nonpoint source pollution programs. The adopted rulemaking would substantially advance this stated purpose by providing one reference point interpreting the jurisdiction of the respective agencies. Promulgation and enforcement of the adopted rule would be neither a statutory nor a constitutional taking of public or private real property because the adopted rule does not affect real property. Because the regulation does not affect real property, it does not burden, restrict, or limit an owner's right to property or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. The adopted rule merely clarifies and explains jurisdiction of the respective agencies. Therefore, the adopted rulemaking will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rule and found it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rule is not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received on consistency with the CMP.

Public Comment

The commission held a public hearing on July 12, 2016. The comment period closed on July 15, 2016. The commission did not receive any comments on this rulemaking.

§7.102

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.104, concerning Memoranda of Understanding (MOU), which authorizes the commission to enter into MOUs and adopt them as rules with other state agencies. Additionally, the amendment is adopted under TWC, §5.103 concerning Rules and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

The adopted amendment implements 31 TAC §523.5.

§7.102. Adoption of Memoranda of Understanding between the Texas State Soil and Water Conservation Board and the Texas Commission on Environmental Quality [Natural Resource Conservation Commission].

[(a)] The regulations of this section adopt by reference 31 TAC §523.5 (relating to Memorandum of Understanding between the Texas State Soil and Water Conservation Board and the Texas Commission on Environmental Quality) as adopted and published in the February 19, 2016, issue of the *Texas Register* (41 TexReg 1253). [This rule contains the memorandum of understanding ("MOU") between the Texas State Soil and Water Conservation Board and the Texas Natural Resource Conservation Commission, which

sets forth the coordination of jurisdictional authority, program responsibility, and procedural mechanisms for point and nonpoint source pollution programs.]

[(1) Whereas, the Texas State Soil and Water Conservation Board, here within called the Board, is the state agency with the primary responsibility for activities relating to agricultural and silvicultural nonpoint source (NPS) pollution abatement; and]

[(2) Whereas, the board shall represent the State before the United States Environmental Protection Agency (EPA), or other federal agencies on matters relating to agricultural and silvicultural nonpoint source pollution abatement; and]

[(3) Whereas, for purposes of this MOU, the board is responsible for NPS pollution abatement activities on all agricultural and silvicultural land as defined by Senate Bill (SB) 503, Texas 73rd State Legislature; and]

[(4) Whereas, the board has established and implemented a water quality management plan certification program, in accordance with SB 503 of the Texas 73rd State Legislature for agricultural and silvicultural lands; and]

[(5) Whereas, the Texas Natural Resource Conservation Commission here within known as the commission, is the state agency with primary responsibility for implementing the constitution and laws of the State related to the quality of water and air; and]

[(6) Whereas, the commission has been designated as the lead agency for the Federal Clean Water Act, §319 program administered by the EPA; and]

[(7) Whereas, the commission shall coordinate all its activities related to this MOU with the board; and]

[(8) Whereas, consistent with the intent of Federal Clean Water Act, §319, the board and the commission are committed to the development and implementation of a coordinated NPS pollution program for the State; and]

[(9) Whereas, for the purpose of this MOU, the commission is responsible for the enforcement of all point source and NPS pollution regulations, including that on agricultural and silvicultural lands; and]

[(10) Whereas, consistent with Texas law and public policy, the board and commission mutually desire to protect and maintain a high quality environment and the health of the people of the State; and]

[(11) Now, therefore, in consideration of the following promises, covenants, conditions, and the mutual benefits to accrue to the parties of this MOU, the Parties, desiring to cooperate in function and service agree as follows:]

[(b) The Texas Natural Resource Conservation Commission agrees to:]

[(1) Administer, for the State, the Federal Clean Water Act, §319 grant program for NPS pollution. The commission will be responsible for coordinating the preparation of grant work programs.]

[(2) Execute cooperative agreements and associated amendments, and grant awards and contracts. The commission will be responsible for monitoring implementation of work programs and providing EPA with necessary financial and programmatic reporting information for non-agricultural/silvicultural surface and ground water work program elements.]

[(3) Implement the provisions of the EPA-approved Federal Clean Water Act, §319 management programs for non-agricultural/silvicultural surface and ground water NPS pollution.]

[(4) Complete, under current administrative procedures, all projects and programs for which grant funds have been awarded, under Federal Clean Water Act, §319. All future projects and programs implementing the EPA-approved Federal Clean Water Act, §319 management program for agricultural/silvicultural NPS pollution, and supported by §319 federal grants, will be administered by the board via a separate grant with EPA.]

[(5) Develop and maintain state guidance for all NPS pollution abatement projects other than agricultural or silvicultural NPS pollution projects as described by this MOU and SB 503.]

[(6) Coordinate with the board those compliance and enforcement actions relative to agricultural and silvicultural pollution.]

[(7) Provide to the board all current forms, timetables, procedural rules and any policy documents of the commission for addressing and processing citizen complaints related to agricultural and silvicultural pollution.]

[(8) Provide the board with access to the commission's electronic database for all current agricultural waste management plans.]

[(9) Investigate and/or monitor compliance of all animal feeding operations (AFO), as defined under Chapter 321, Subchapter K of this title (relating to Concentrated Animal Feeding Operations), other than those covered by subsection (c)(12) of this section.]

[(10) In response to a general complaint, investigate a facility to determine whether a permit or written authorization under Chapter 321 of this title (relating to Control of Certain Activities by Rule) is required of the facility. If problems are documented or conditions exist which have the potential to adversely impact the

environment, the facility owner or operator will have the option of being referred to the board for the purpose of obtaining a certified water quality management plan or obtaining authorization under Chapter 321 of this title from the commission. If the owner or operator of a facility requests referral to the board in order to obtain a certified water quality management plan, the commission will send the board all pertinent documentation within five working days of the investigation.]

[(11) Retain the responsibility for pursuing any enforcement action related to a violation of a commission rule or order which occurred prior to the facility operator/owner obtaining a certified water quality management plan.]

[(12) Pursue appropriate enforcement action in accordance with commission rules against any person referred in accordance with subsection (c)(10) of this section.]

[(c) The Texas State Soil and Water Conservation Board agrees to:]

[(1) Serve as the recipient of grants from EPA for agricultural and silvicultural NPS pollution projects as described in this MOU and SB 503 and funded through Federal Clean Water Act, §319.]

[(2) Coordinate directly with the EPA on matters relating to programmatic and financial issues of agricultural and silvicultural projects funded by the board through separate grants from EPA under Federal Clean Water Act, §319. Notify the commission in

writing on any decision made that results in a change in the programmatic or financial status of a project.]

[(3) Provide the EPA with required reports for all agricultural/silvicultural projects funded through the board by the Federal Clean Water Act, §319. Reports will be submitted in accordance with EPA requirements.]

[(4) Develop and maintain state guidance for agricultural or silvicultural NPS pollution as described by this MOU and SB 503.]

[(5) Provide to the commission information about agricultural and silvicultural activities required for the annual evaluation of the state's implementation of the NPS Management Plan.]

[(6) Process citizen complaints related to agricultural and silvicultural NPS pollution in a manner that is consistent with the practices and standards of the commission.]

[(7) Schedule and conduct management meetings with the EPA to review the status of agricultural and silvicultural NPS pollution project/program activities as negotiated with EPA.]

[(8) Develop and maintain a current electronic database to track and document the proceedings of all water quality management plans and corrective action plans. Data recorded will include, but not be limited to, the identification of applicant(s), date of application for each plan, and approval date of each plan.]

[(9) Provide the commission with access to the board's electronic database for all water quality management plans. Software and equipment necessary to facilitate electronic transfer of data should be compatible with that of the commission.]

[(10) Refer to the commission for possible enforcement action any complaint or violation related to a certified water quality management plan for an AFO, a law or rule relating to agricultural or silvicultural nonpoint source pollution for which the board has determined that the necessary corrective action has not been taken. The board, upon referral, shall provide the commission documentation, including but not limited to, any original documents or "certified copies" of the original documents and hard copies of all photographs, sample analyses, correspondence, records and other documents relating to the complaint.]

[(11) Provide the commission with documentation (board rules, policies, guidance, etc.) for development, supervision, and monitoring of individual certified water quality management plans.]

[(12) Investigate complaints and monitor compliance of all AFOs operating under a certified water quality management plan or any facility covered by law or board rule relating to agricultural or silvicultural nonpoint source pollution.]

[(13) Investigate any complaint received by the board to determine whether such a facility will need to obtain authorization from the commission. Those facilities which are determined to require authorization from the commission under Chapter 321 of this title (relating to Control of Certain Activities by Rule) will be referred to the commission within five working days from the date of investigation. If it is determined that the potential for a water quality violation exists at a facility that does not need authorization under Chapter 321 of this title, and the facility owner/operator does not implement a corrective action plan or does not file an application for a certified water quality management plan to resolve the complaint within 45 days of notification of the investigation outcome, the board shall automatically refer the facility to the commission for possible enforcement action, written authorization, or a permit.]

[(14) Refer to the Commission for possible enforcement action, complaints which were initially resolved by an agreement to develop a site specific certified water quality management plan for the involved facility and for which the facility owner/operator has not signed such a plan within 90 days of the date their request for planning assistance was approved by the Soil and Water Conservation District.]

[(15) Refer to the Commission for possible enforcement any complaint received for which there has been an immediate impact to aquatic life. Any investigation by the Board of a complaint related to an AFO holding a certified water quality management plan and for which a violation is documented that causes a situation in which exposure of contaminants to the air, water or land is affecting human health and safety, or will cause serious impact to the environment unless immediate actions are taken, shall be automatically referred to the Commission for possible enforcement action.]

[(d) Both parties agree to:]

[(1) Work together to refine the existing process for screening and prioritization of project proposals to be funded under Federal Clean Water Act, §319.]

[(2) Coordinate efforts in the development and submission of an annual work program to EPA for Federal Clean Water Act, §319, funding.]

[(3) Maintain each party's existing level of effort required by the EPA for the implementation of §319 programs/projects.]

[(4) Communicate and coordinate directly with each other and the EPA on matters relating to program/project planning and implementation of NPS pollution activities/projects funded by Federal Clean Water Act, §319.]

[(5) Provide required reports to the EPA on NPS pollution project activities.

Reports will include status of project implementation, summary of information/education activities, monitoring activities, and other outputs satisfactory to EPA.]

[(6) Meet semi-annually to review and discuss the state's NPS water quality

program and to refine agency coordination mechanisms.]

[(7) Work together to develop criteria for the development of water quality

management programs that satisfy the state water quality standards as established by the Commission.]

[(8) Comply with all relevant state and federal statutes and procedures, and

grant conditions, including financial audits, data quality assurance and quality control, and progress reports.]

[(9) Cooperate on activities related to the implementation of the "Texas State

Management Plan for Agricultural Chemicals in Ground Water."]

[(e) General conditions:]

[(1) Term of MOU. The term of this MOU shall be from the effective date until termination.]

[(2) Notice of Termination. Any party may terminate this MOU upon a 90 day written notice to the other party. Both parties agree to fulfill any grant commitments in place at the time of termination. Only upon written concurrence of the other agency can this MOU be modified.]

[(3) Cooperation of Parties. It is the intention of the board and the commission that the details of providing the services in support of this MOU shall be worked out, in good faith, by both agencies.]

[(4) Nondiscrimination. Activities conducted under this MOU will be in compliance with the nondiscrimination provisions as contained in Titles VI and VII of the Civil Rights Act of 1964, as amended, the Civil Rights Restoration Act of 1987, and other nondiscrimination statutes, namely Section 504 of the Rehabilitation Act of 1973, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, and the Americans With Disabilities Act of 1992, which provide that no person in the United States shall, on the grounds of race, color, national origin, age, sex, religion, marital status, or handicap be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving federal financial assistance.]

[(5) Notices. Any notices required by this MOU to be in writing shall be addressed to the respective agency as follows: Texas Natural Resource Conservation Commission, Attn: _____, P.O. Box 13087, Austin, TX 78711-3087 and to the Texas State Soil and Water Conservation Board, Attn: _____, P.O. Box 658, Temple, TX 76503-0658.]

[(6) Effective Date of MOU. This MOU is effective upon execution by both agencies. By signing this MOU, the signatories acknowledge that they are acting under proper authority from their governing bodies.]